

LYONS & FLOOD, LLP  
65 W. 36<sup>th</sup> Street, 7<sup>th</sup> Floor  
New York, NY 10018  
(212) 594-2400

Attorneys for Defendant  
MEDITERRANEAN SHIPPING COMPANY, S.A.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

LIBERTY MUTUAL GROUP INC.  
as subrogee of BODGER SEEDS, LTD.,

Plaintiff,

- against -

MEDITERRANEAN SHIPPING COMPANY S.A.,

Defendant,

-----X

**ECF CASE**

08 Civ. 00223 (JSR)

**AFFIRMATION OF  
EDWARD P. FLOOD  
IN SUPPORT OF MOTION  
FOR SUMMARY  
JUDGMENT**

EDWARD P. FLOOD, an attorney duly admitted to practice law before  
this Court, affirms the following under the penalties of perjury under 28 USC § 1746:

1. I am an attorney at law and a member of the firm of Lyons &  
Flood, LLP, attorneys for Defendant MEDITERRANEAN SHIPPING COMPANY, S.A.  
("MSC"), and I have personal knowledge of the facts contained herein.

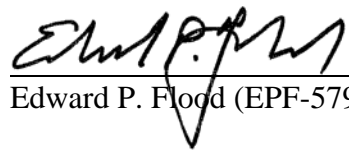
2. This Affirmation is respectfully submitted in further support of  
MSC's motion for summary judgment requesting a judicial determination that MSC is  
not liable for unavoidable sweat damage to 648 bags of flower seeds, and for such other,  
further relief, as this Court may deem just and proper.

3. On July 25, 2008, we received the Affidavit of Joseph Apolinar,  
attached to this Affirmation as Exhibit A, in an email from plaintiff's counsel.

4. Plaintiff has produced a survey report from Dennis Berri of Vericclaim Inc., the surveyor it appointed, which is attached to this Affirmation as Exhibit B.

The foregoing is true and correct to the best of my knowledge under the penalty of perjury.

Executed on: August 7, 2008

A handwritten signature in black ink, appearing to read "Edward P. Flood", is written over a horizontal line.

Edward P. Flood (EPF-5797)

# **EXHIBIT A**

JUL-23-2008 WED 12:47 I ADIAK WILL AND RUDDY

FAX NO. 23766778

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UNITES STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
LIBERTY MUTUAL GROUP, INC.,  
As subrogee of BODGER SEEDS, LTD.,

08 CV 00223 (JSR)

Plaintiff,

AFFIDAVIT

- against -

MEDITERRANEAN SHIPPING  
COMPANY, S.A.,

Defendant.

-----X  
STATE OF CALIFORNIA )  
SS.  
COUNTY OF Santa Barbara

JOSEPH APOLINAR, being duly sworn, deposes and says:

1. I am employed by Environmental Seed Producers ("ESP") and, at all material times, was assigned to the Shipping and Receiving Department.
2. On or about April 4, 2007, container number MSCU1550902 ("Container") was delivered to ESP's warehouse in Lompoc, California.
3. I was personally responsible for unloading the Container which held a shipment of 648 bags of flower seeds transported from Tanzania to Long Beach, California.
4. The Container was delivered to ESP's warehouse with the seals in tact. I personally cut the seals prior to unloading.
5. I personally observed the vents of the Container and observed that all vents were open and completely unobstructed when the Container arrived at ESP's warehouse. There was no cellophane or any other material covering any of the vents.

JUL-23-2008 WED 12:47 1 ADIAK WILL AND RUDDY

FAX NO. 23766778

P. 03

6. At the time the Container left ESP's warehouse, there was no covering of any kind over any of the vents.

*Joe Apolinar*

JOSEPH APOLINAR

Sworn to before me this  
\_\_\_\_th day of July, 2008.

*See attached*  
\_\_\_\_\_  
NOTARY PUBLIC

**CALIFORNIA JURAT WITH AFFIANT STATEMENT**

- ☒ See Attached Document (Notary to cross out lines 1-6 below)  
☐ See Statement Below (Lines 1-5 to be completed only by document signer[s], *not* Notary)

1 \_\_\_\_\_  
2 \_\_\_\_\_  
3 \_\_\_\_\_  
4 \_\_\_\_\_  
5 \_\_\_\_\_  
6 \_\_\_\_\_

Signature of Document Signer No. 1      Signature of Document Signer No. 2 (if any)

State of California

County of Santa Barbara

Subscribed and sworn to (or affirmed) before me on this

24<sup>th</sup> day of July, 2008, by  
Date      Month      Year  
(1) JOSE APDINAR  
Name of Signer

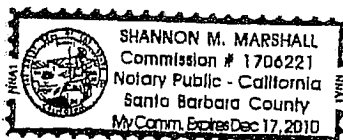
proved to me on the basis of satisfactory evidence  
to be the person who appeared before me (.) (,)

(and

(2) \_\_\_\_\_  
Name of Signer

proved to me on the basis of satisfactory evidence  
to be the person who appeared before me.)

Signature Shannon M. Marshall  
Signature of Notary Public



Place Notary Seal Above

**OPTIONAL**

*Though the information below is not required by law, it may prove  
valuable to persons relying on the document and could prevent  
fraudulent removal and reattachment of this form to another document.*

**Further Description of Any Attached Document**Title or Type of Document: AffidavitDocument Date: 7/24/08 Number of Pages: 1

Signer(s) Other Than Named Above: \_\_\_\_\_

**RIGHT THUMBPRINT  
OF SIGNER #1**  
Top of thumb here

**RIGHT THUMBPRINT  
OF SIGNER #2**  
Top of thumb here

# **EXHIBIT B**



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Los Angeles, California 90017  
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**MARINE CARGO SURVEY REPORT NO. LAX07288500/TMS/DWB**

Examined For The Account Of Whom It May Concern

**At The Request Of**

Liberty International Underwriters  
55 Water Street, 18<sup>th</sup> Floor  
New York, NY 10041

**Your Reference No.: Bodger Seeds/  
LIU #4NMAR-99016**

RE: **Vessel** : "MSC ILONA" V.0701A  
**Arrival** : Long Beach, California; on or about April 4, 2007  
**Bill of Lading No.** : TANG/LONG BEACH; No. MSCUTA011430  
**Container No.** : MSCU1550902  
**Shipment** : 648 Bags of Flower Seeds  
**Assured** : Environmental Seed Producers  
**Policy No.** : APPOMCSE018791006

**THIS IS TO CERTIFY THAT:**

**BACKGROUND:**

Survey was requested on April 13, 2007, by Fred Fernandez of Liberty International Underwriters.

At the time of assignment, no dollar amount of loss was provided to us. It was reported that the stated shipment had suffered water damage.





SURVEY REPORT NO. LAX07288500/TMS/DWB PAGE NO. 2

**SHIPMENT PARTICULARS:****Shipment:** 648 Bags of Flower Seeds, Weighing 15,969.5 Kilos:

Item No.	Item Description	Qty in Kilo	Number Of Bags	Bag Number
19023	Tropaeolum Maj. Scarlet Gleam	500.00	20	1-20
19135	Zinnia El. Tetra State Fair Mix	121.00	5	21-25
17948	Tagetes Pat. Brocade Mix	30.00	3	26-28
19028	Zinnia El. Dahliafl. Canary Bird	80.00	4	29-32
17947	Tagetes Pat. Nana Petite Yellow	49.00	4	33-36
19022	Tropaeolum Maj. Golden Gleam	426.00	17	37-53
19025	Tropaeolum Nanum Alaska Mix	327.00	13	54-66
19015	Tropaeolum Nanum Empress of India	669.00	29	67-95
19027	Tropaeolum Maj. Cherry Rose	193.50	8	96-103
19131	Zinnia El. Willy Rogers	79.00	4	104-107
19026	Tropaeolum Maj. Tall Sgt. Mix	641.00	26	108-133
19024	Tropaeolum Maj. Glorious Gleam Mix	242.00	10	134-43
19014	Tropaeolum Nanum Whirly Bird Mix	500.00	20	144-163
17939	Thunbergia Alata Mix	112.00	5	164-168
17950	Tropaeolum Maj. Dwarf Jewell Mixed	12,000.00	480	169-648



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**Invoice No:** 48 dated January 3, 2007; US\$63,688.13 basis for the entire shipment.

**Shipper:** Maua Arusha Ltd.  
P.O. Box 15002  
Arusha, Tanzania

**Consignee:** Environmental Seed Producers  
1851 West Olive Avenue  
Lompoc, CA 93436

**TRANSIT DETAILS:**

The shipment was loaded onboard the M/V "ROYAL ZANZIBAR" V.56R on January 26, 2007, in the Port of Tanga, Tanzania and transported to Long Beach, arriving on April 4, 2007. The shipment had been transloaded onboard the M/V "MSC ILONA" V.0701A; however, we were unable to determine the port or date of the transload.

**EXCEPTIONS:**

No exceptions were taken at the time of delivery.

**SURVEY / INVESTIGATION FINDINGS:**

**Attendance Date and Location:**

- April 17, 2007 at Environmental Seed Producers, 1851 West Olive Avenue, Lompoc, CA 93436

**Parties in Attendance:**

- Capt. Arun Jolly, Techno Marine Services on behalf of Carrier's interests.
- Ms. Anita Laemoa of Environmental Seed Producers
- Dennis Berri, Senior Surveyor, Vericclaim, Inc., on behalf of Underwriter's interests.

**NARRATIVE:**

Subsequent to receiving this assignment, contact was made with the Ultimate Consignee and an appointment was arranged to complete a joint survey with the carrier's surveyor on April 17, 2007. Upon arrival at the Consignee's facility, we were escorted to the warehouse, where the shipment was being held, pending our arrival. At that time we found a total of 648 bags containing various types of flower seeds as seen in the attached **Photographs Numbered 1 through 24**. It was noted that the packaging utilized was polystyrene woven plastic bags, which were double sewn closed. No inner lining was utilized within the woven plastic bags. Initial examination of the bags showed signs of rust marks on the exterior of numerous bags, along with water staining. We also noted signs of water condensation within the shrink-wrap, which was holding the bags in place on wood pallets, where they were being stored on.

Initially, we noted a number of different types of style species and seeds to be included in those shipments. The following is a breakdown of the quantity of bags per species:

Item No.	Item Description	Qty in Kilo	Number Of Bags
19023	Tropaeolum Maj. Scarlet Gleam	500.00	20
19135	Zinnia El. Tetra State Fair Mix	121.00	5
17948	Tagetes Pat. Brocade Mix	30.00	3
19028	Zinnia El. Dahliabl. Canary Bird	80.00	4
17947	Tagetes Pat. Nana Petite Yellow	49.00	4
19022	Tropaeolum Maj. Golden Gleam	426.00	17
19025	Tropaeolum Nanum Alaska Mix	327.00	13
19015	Tropaeolum Nanum Empress of India	669.00	29
19027	Tropaeolum Maj. Cherry Rose	193.50	8
19131	Zinnia El. Willy Rogers	79.00	4
19026	Tropaeolum Maj. Tall Sgt. Mix	641.00	26
19024	Tropaeolum Maj. Glorious Gleam Mix	242.00	10
19014	Tropaeolum Nanum Whirly Bird Mix	500.00	20
17939	Thunbergia Alata Mix	112.00	5
17950	Tropaeolum Maj. Dwarf Jewell Mixed	12,000.00	480



It was noted that there was actually only four (4) types of actual species; however, that the different item numbers are different colors and variations of those species. We therefore had the Consignee open up a random sampling of each type of seed in an effort to ascertain the condition of the seeds within the plastic bags. The first item examined was the Tropaeolum (Renuncula). Illustrations of the seeds, which were found in the sampling of those bags, can be seen in **Photographs Numbered 4 through 15, 17 and 18**. It was noted the seeds had experienced contact with moisture, causing the seeds to shrink and become a dark color, as well as bunching together and becoming moldy to varying degrees.

The second type of seeds examined consisted of the Zinnia. Illustrations of the condition of this particular seed and sampling examined can be seen in **Photograph No. 16**. No signs of obvious damage were noted to this particular seeds; however, the Consignee stated that the seeds did feel slightly wet to the touch and may have been affected.

The third type of seed, which was examined from the sampling, was from the Tropaeolum species. Illustrations of the condition of this species can be seen in **Photographs Numbered 19 and 20**. No signs of obvious damage were noted to the seed; however, once again the Consignee expressed concern as to the fact that the seeds felt slightly wet to the touch.

The fourth and last type of seed, which was sampled consisted of the Tagetes, which was also known as Black Lily. Illustrations of the condition of that seed can be seen in **Photographs Numbered 21 through 24**. Once again, we noted no signs of obvious damage to the seed; however, the Consignee was concerned that the seeds felt moist to the touch.

During our conversations with the Consignee, we inquired as to whether the contents of the bags can be skimmed with the portion of the seeds, which were obviously affected by moisture being removed with the balance of the shipment being utilized for its intended purpose. The Consignee stated the only way that they would be able to evaluate the condition of the seed would be to take a random sampling from good bags and bad bags and send them to a lab and have them tested for germination capabilities. Apparently, the laboratory uses chemicals to plant the seeds and observe the germination process to determine if the seeds were affected. The laboratory would then arrive at a percentage of the seeds, which they would consider to be non-usable, with the balance being acceptable. We therefore advised the Consignee that this should be undertaken in an effort to minimize the loss and to determine the actual extent of the damages.

Subsequent to our surveying the seeds in question, we were taken to the Consignee's office and provided with a CD of the photographs showing the condition of the load at the time of delivery. We noted that there was heavy rust stains and obvious signs of



water contact to numerous bags at the time of devanning. We also noted signs of a white residue supposedly caused due to the contact with moisture on the walls of the container. We inquired as to whether there was any obvious defects to the container at the time of delivery; at which time the Consignee advised us that they noted no signs of obvious defects; however, did comment that the majority of the wet bags were found along the walls of the container and at the rear doors.

During our conversations with Capt. Jolly, the surveyor for the carrier, we were advised that he did complete a survey of the container at the dock prior to it being loaded out onto another vessel. He further stated that the container, at the time of survey was fully loaded with an outbound load therefore, he was unable to visually examine the interior of the container. We were shown the photographs; however, he stated that he would be unable to release the photographs to us without the carrier's permission. We were provided with the name of the Claims Department and we will be contacting them in an effort to obtain copies of these photographs in question. We can state that our examination of the photographs we were being shown, showed no obvious signs of defects to the container.

Subsequent to our original survey, we have been advised by the laboratory that our sampling of the packaging proved negative, indicating that the wetting was caused by fresh water. We attached to this report a copy of the Laboratory Analysis from A.J. Edmond Company regarding the salinity of the sampling examined.

We also attached to this report a copy of the email correspondence between the Consignee and the carrier placing them on notice of claim.

We have also received the results of the laboratory tests of the seeds in question. The Consignee had dried and forwarded a sampling of the seed bags from each species to the lab for testing. The lab results showed that the Russl Minimum Germination Percentage Acceptable for the various seeds were either 60% to 65%, which varied by species. Subsequent to the test being completed, it appears that all but three (3) species type failed to meet the germination minimum qualifications. The balance of the shipment has been rejected by the Consignee.

The claim as presented by the Consignee is as follows:

Item No.	Item Description	Qty. in Kilo	Unit Price In USD	Total Amount In USD
19023	Tropaeolum Maj. Scarlet Gleam	500.00	3.78	1,890.00
17947	Tagetes Pat. Nana Petite Yellow	49.00	7.00	343.00
19022	Tropaeolum Maj. Golden Gleam	426.00	3.78	1,610.28




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19025	Tropaeolum Nanum Alaska Mix	327.00	3.78	1,236.06
19015	Tropaeolum Nanum Empress of India	669.00	3.78	2,528.82
19027	Tropaeolum Maj. Cherry Rose	193.50	3.78	731.43
19131	Zinnia El. Willy Rogers	79.00	8.00	632.00
19026	Tropaeolum Maj. Tall Sgt. Mix	641.00	3.78	2,422.98
19024	Tropaeolum Maj. Glorious Gleam Mix	242.00	3.78	914.78
19014	Tropaeolum Nanum Whirly Bird Mix	500.00	3.78	1,890.00
17939	Thunbergia Alata Mix	112.00	20.90	2,340
17950	Tropaeolum Maj. Dwarf Jewell Mixed	12,000.00	3.78	45,360.00

Subsequent to receiving a Sales Authorization for the rejected portion of the shipment, the goods has been placed out for salvage bid. The highest bid being \$1,176.00. The check has been forwarded to the Consignee made payable in that amount and should be taken into consideration should any adjustment be made to this claim.

**CAUSE OF DAMAGE:**

Based on the documentation, the damages appear to have occurred during transit. Since we were unable to survey the empty container, we were unable to comment as to its condition, other than to state, we noted no obvious damages to it during our review of Capt. Jolly's photographs.

Based on the chloride tests completed by the laboratory, the wetting was due to contact with fresh water.

**DISPOSITION:**

The rejected portion of the shipment has been placed out for salvage bid and sold for \$1,176.00.





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**A SUMMARY OF THE LOSS:**

The extent of loss can be summarized as follows, subject to the terms and conditions of the policy of insurance:

**Bill of Lading No.:** MSCUTA011430

**Shipment:** Flower Seeds

**Container No.:** MSCU1550902

**Invoice Value** \$63,688.13  
**Quantity Sound:** 12 Bags

**Quantity Damaged:** 636 Bags

**Type of Damage:** Water damage

**Disposition:** The rejected portion of the shipment salvaged for \$1,176.00.

**RECOVERY TABLE:**

<b>1.</b>	
<b>Name of Carrier:</b>	Mediterranean Shipping Co. (USA), Inc.
<b>Address:</b>	420 Fifth Avenue, 8 <sup>th</sup> Floor New York, NY 10018
<b>Notified:</b>	Yes, on April 10, 2007, by Consignee.
<b>Response:</b>	Joint survey completed with Steamship Line Surveyor
<b>Delivery Documents:</b>	Requested, but not received
<b>Exceptions:</b>	No exceptions taken

There is a total of **39 Photographs** depicting the conditions of the shipment at the time of our survey has been previously submitted with our Preliminary Report.



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All of our actions in this matter were without prejudice and subject to the terms and conditions of the policy of insurance.

**VeriClaim**

A handwritten signature in dark ink, appearing to read "Dennis Berri", is written over a horizontal line.

Dennis Berri  
Senior Marine Surveyor

Los Angeles, California  
August 9, 2007

DWB:vbl







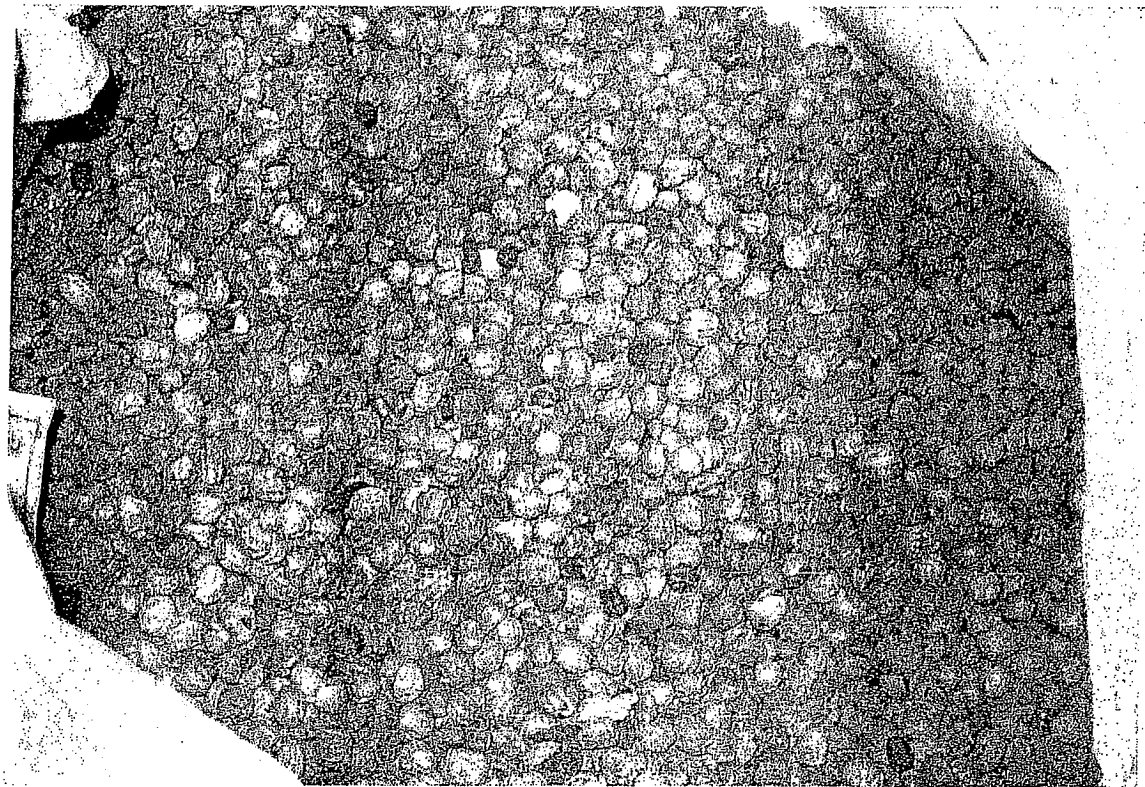


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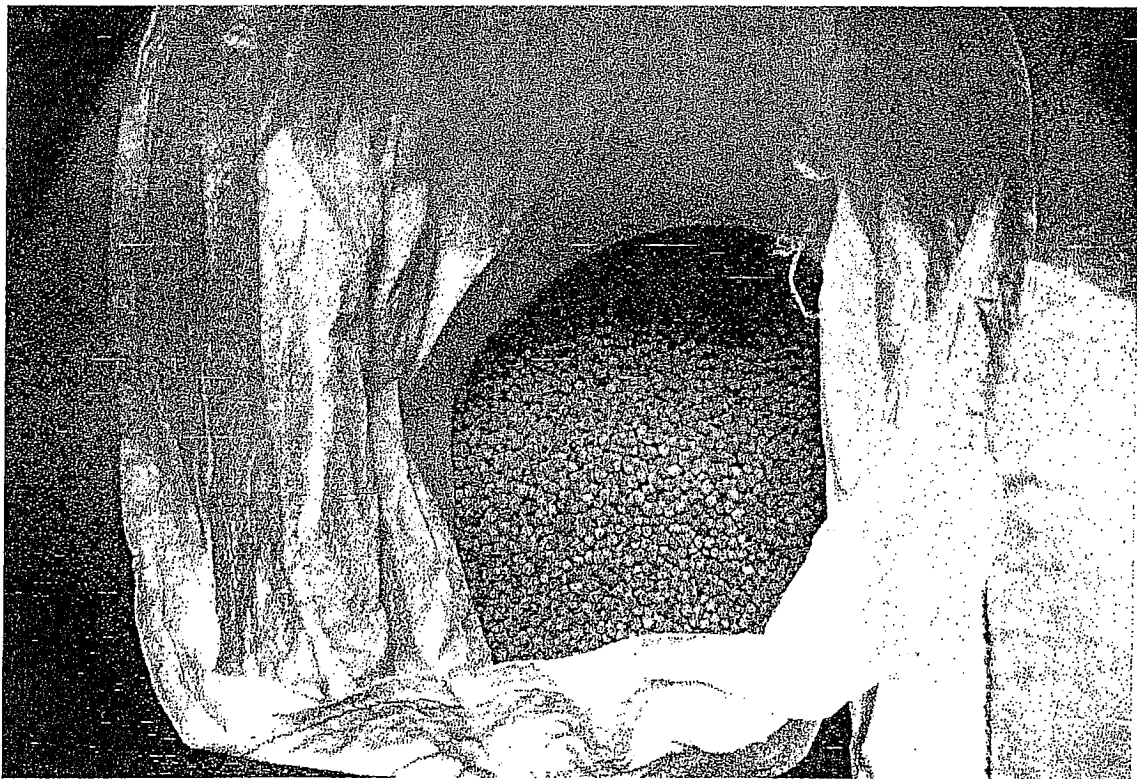


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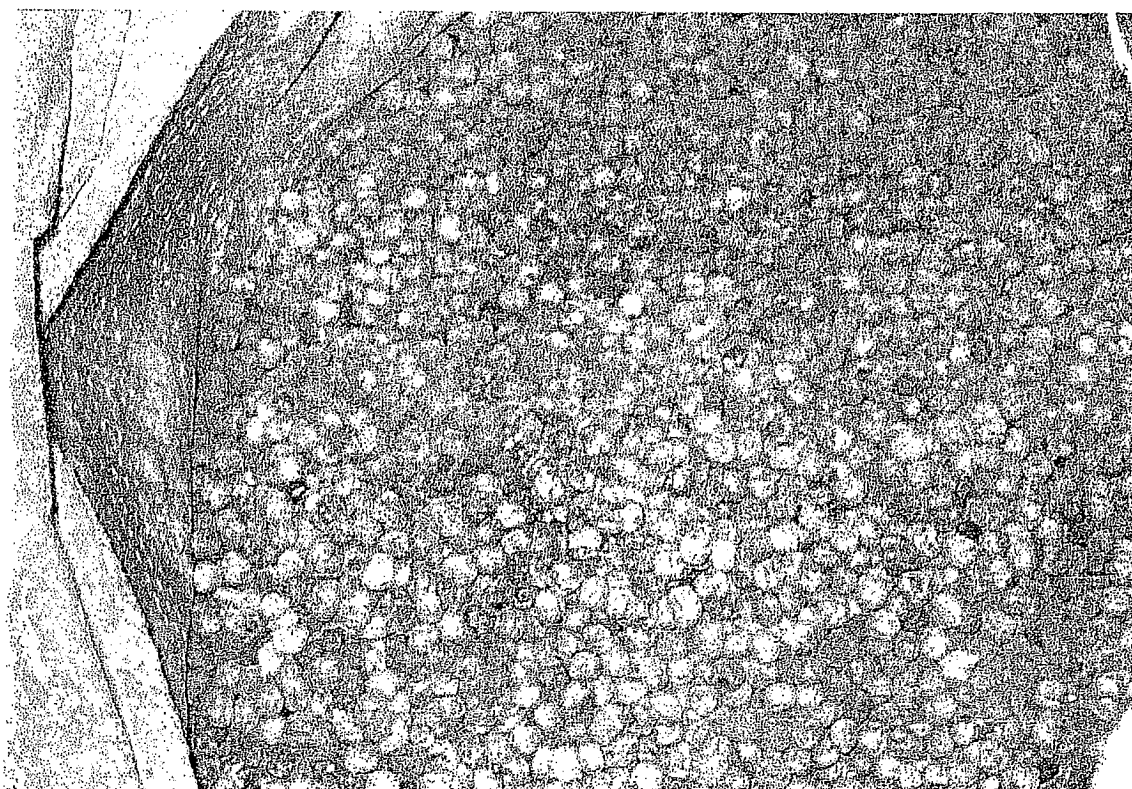


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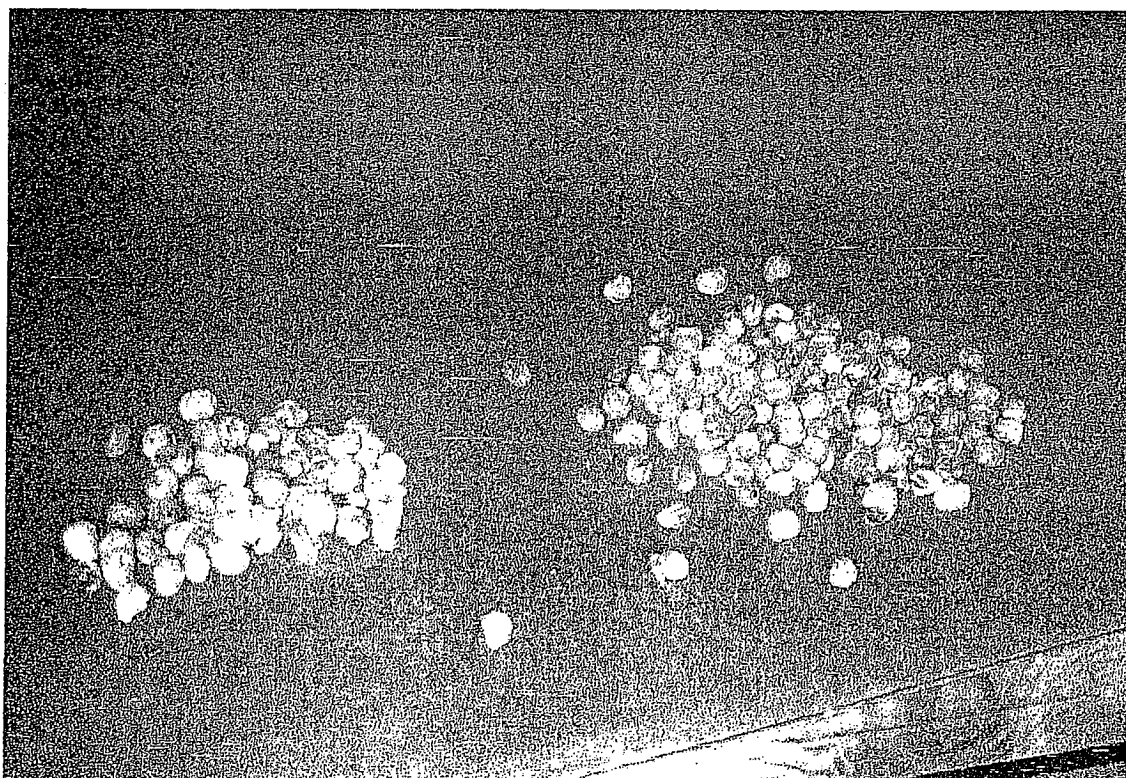


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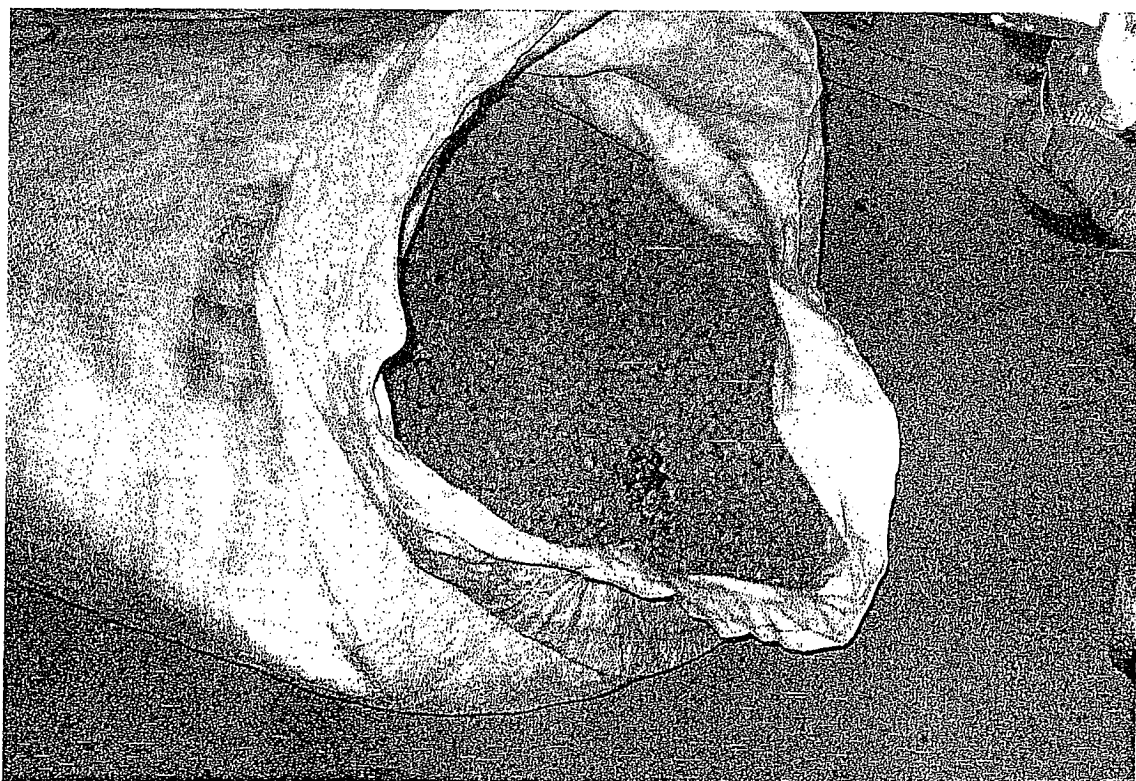
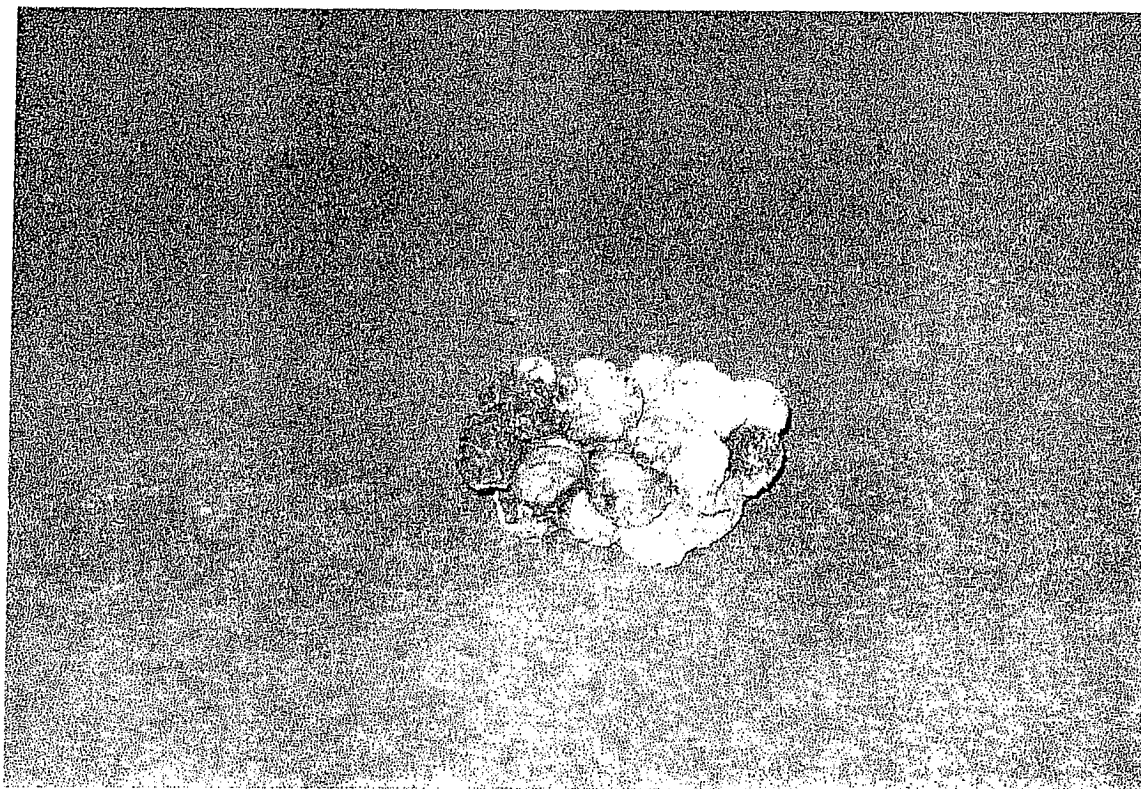


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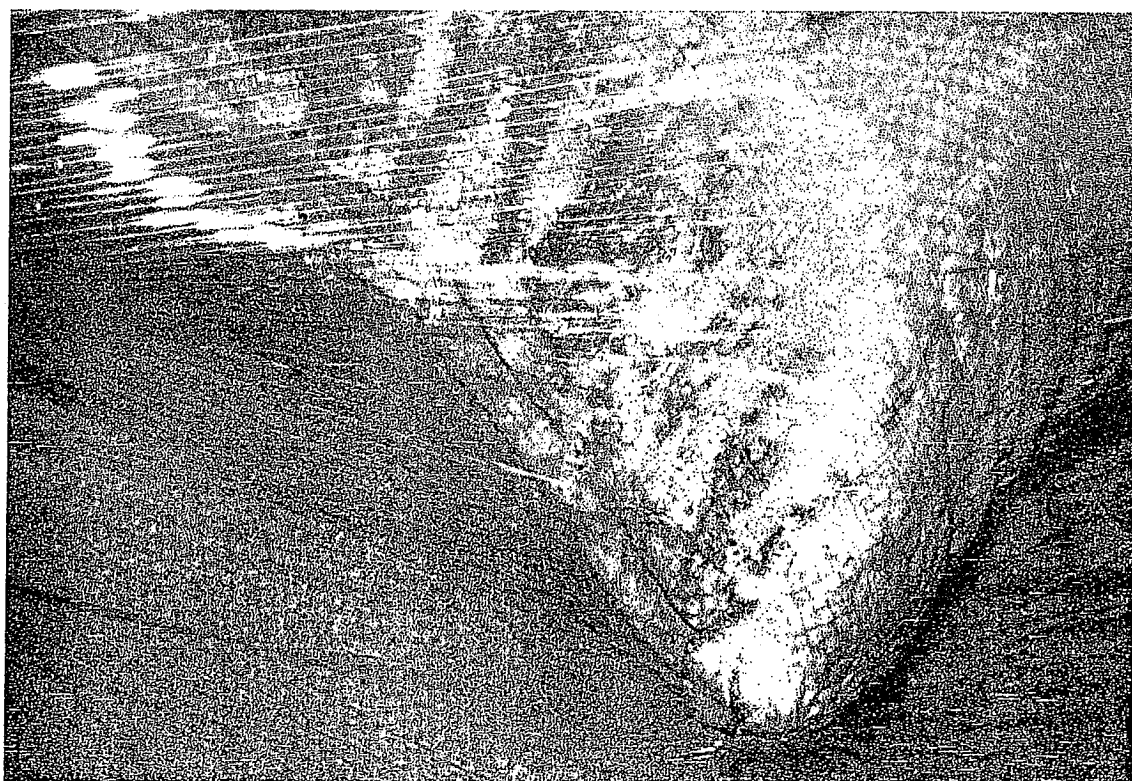


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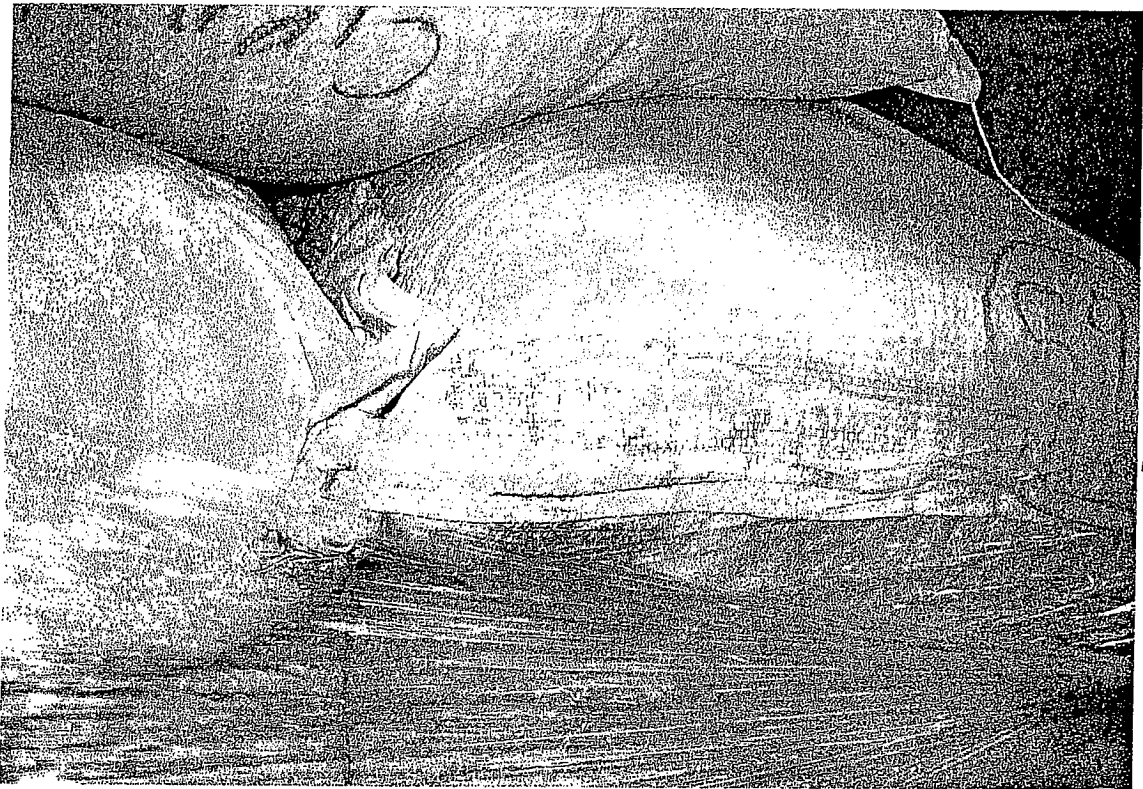




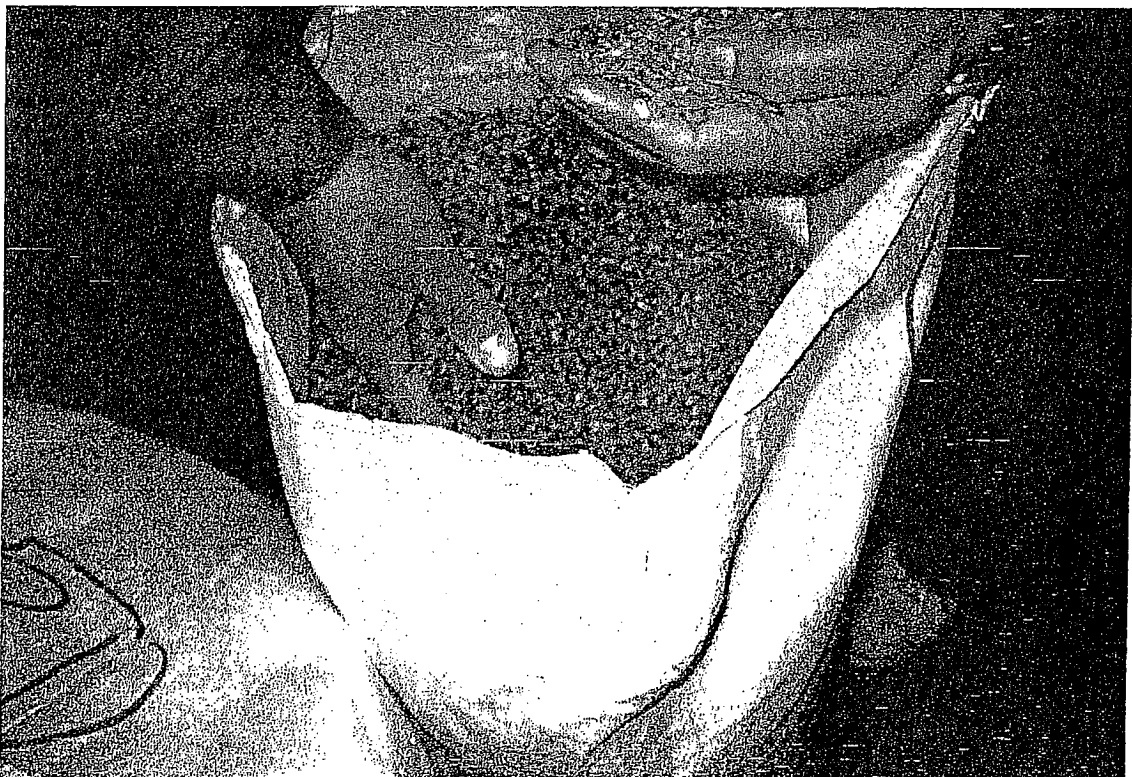
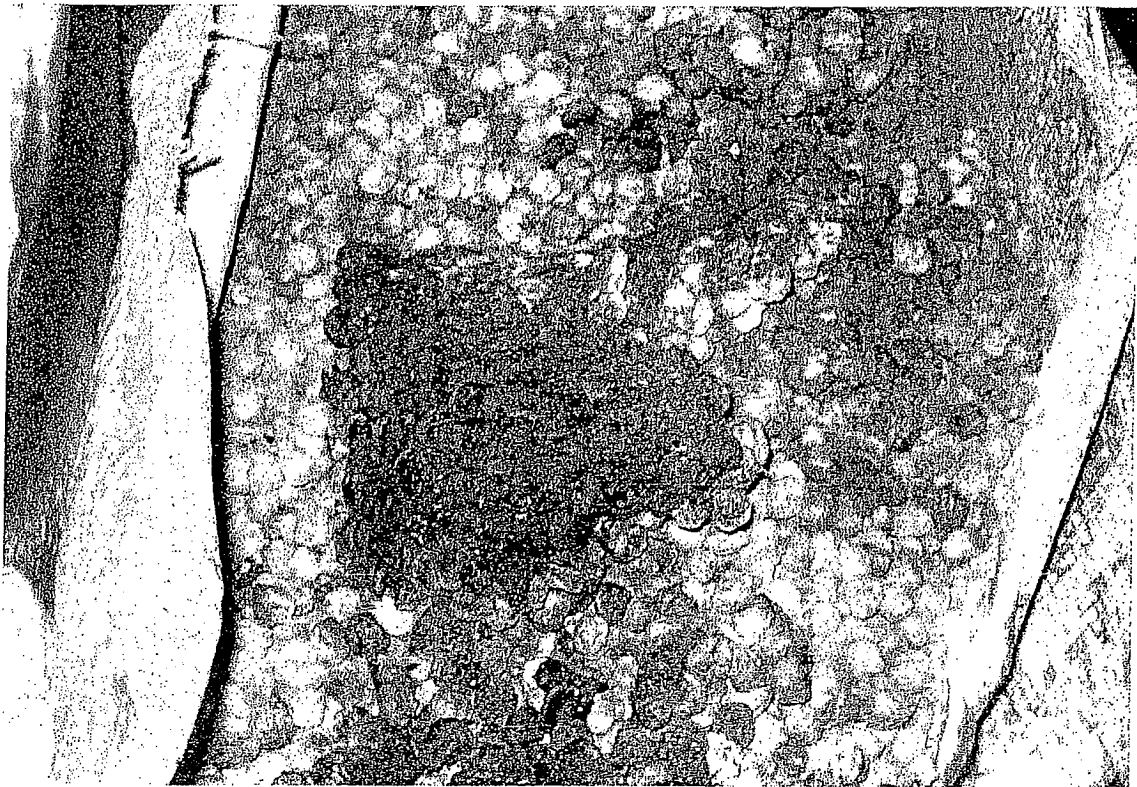




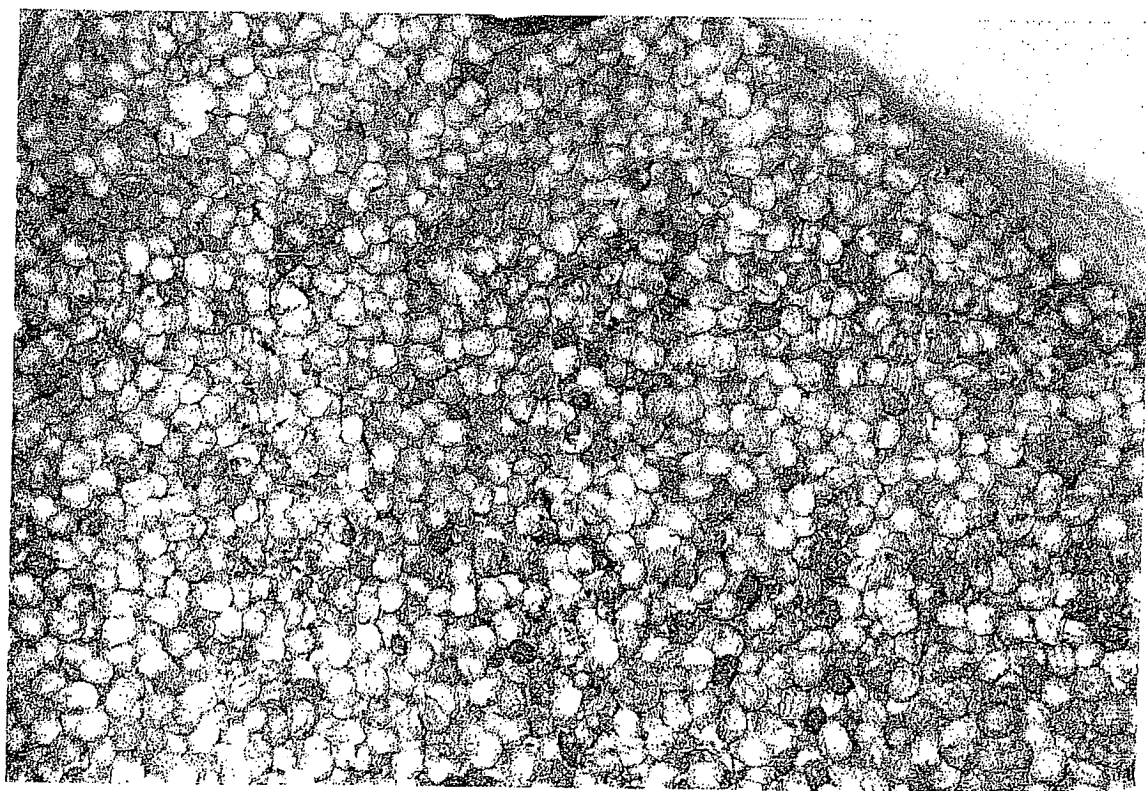




















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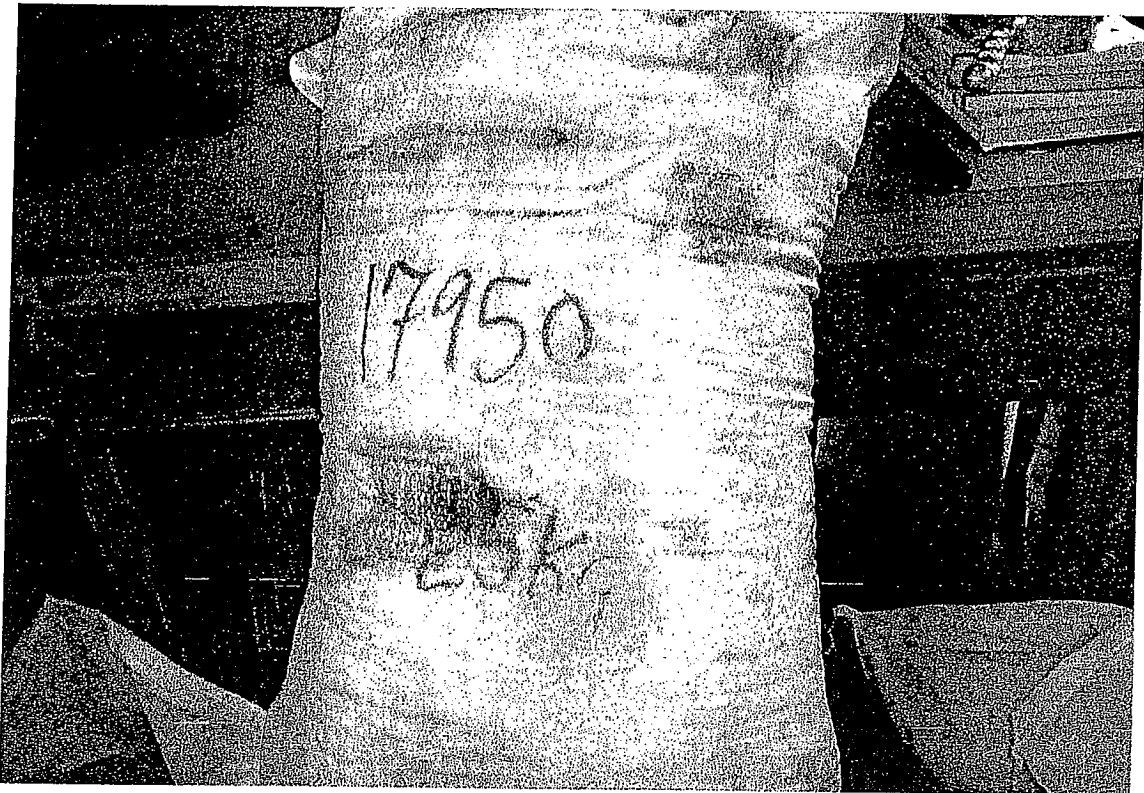


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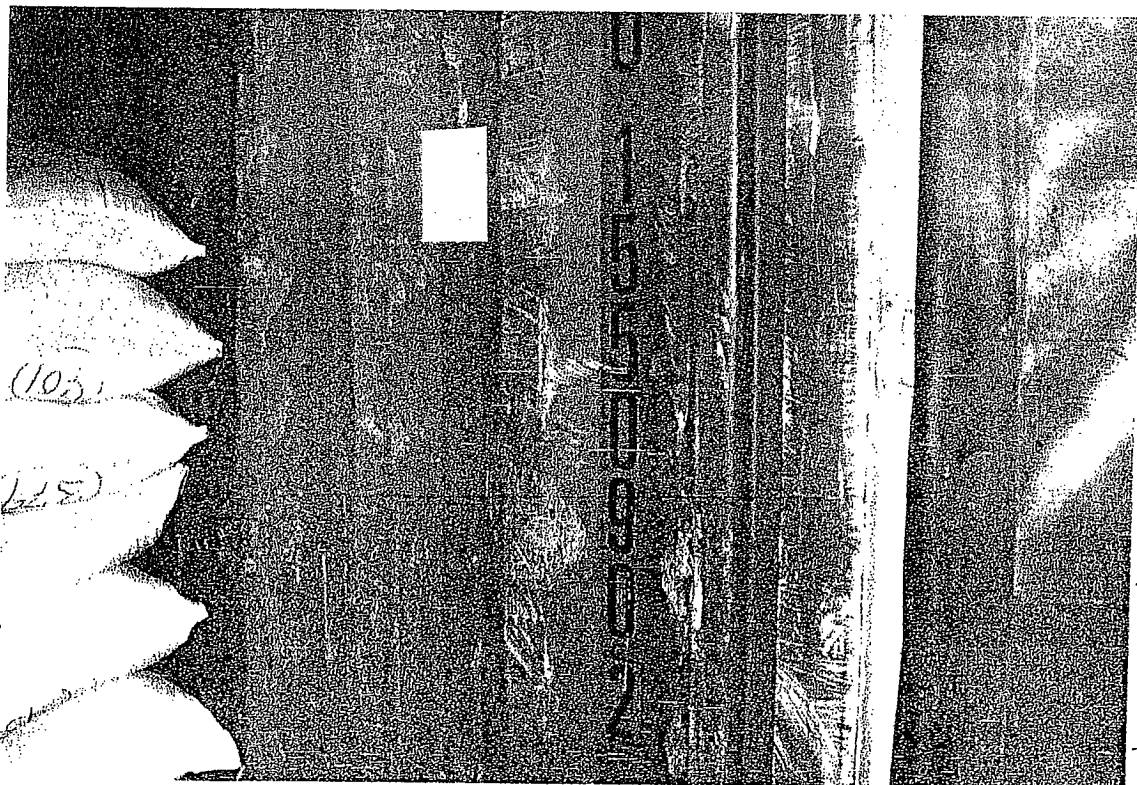


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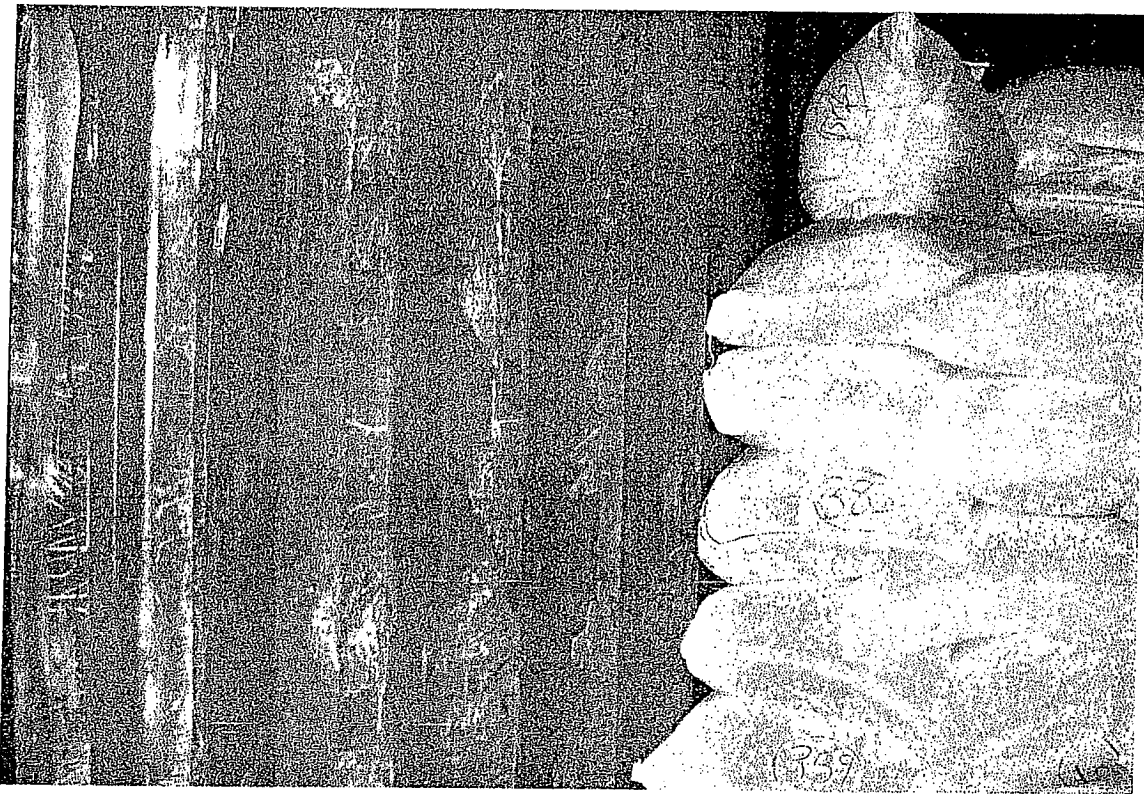


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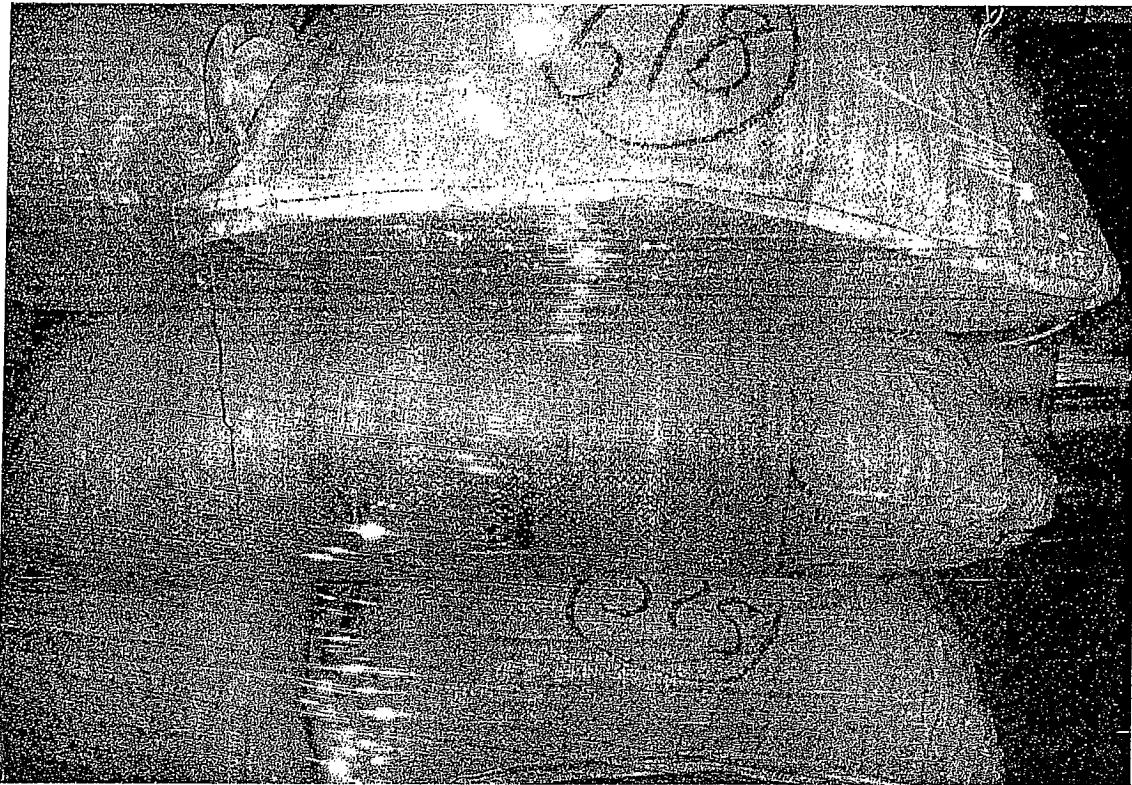


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